IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

W. H. ELLIOTT & SONS CO., INC.

Plaintiff-Appellant

vs.

NUODEX PRODUCTS CO., INC.

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

RECORD APPENDIX TO BRIEF FOR THE APPELLANT

Submitted by

STANLEY M. BROWN, and

McLANE, CARLETON, GRAF, GREENE & BROWN

Attorneys for Appellant

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No. 5125

W. H. ELLIOTT & SONS CO., INC.
Plaintiff Appellant

vs.

NUODEX PRODUCTS CO., INC.
Appellee

RECORD APPENDIX

RELEVANT DOCKET ENTRIES

1954

Oct. 25 Complaint and demand for jury trial.
Summons issued.
Marshal's return on service of summons on October 25, 1954.

Nov. 13 Appearance for defendant, E. & F. King Co., Inc., Upton Sanders & Upton, John H. Sanders, Esq.
Motion of defendant, E. & F. King Co., Inc., for extension of time in which to file answer.
Appearance for defendant Nuodex Products Co., Inc., Sullowav, Jones, Hollis & Godfrey, Frank J. Sullowav, Esq.
Motion of defendant Nuodex Products Co., Inc., to dismiss.

Nov. 18 Motion of plaintiff for an order granting plaintiff leave to take oral depositions.

1955

Feb. 28 Hearing is had on plaintiff's motion to take depositions. Taken under advisement. Connor, J.
Hearing is had on Par. 1 of defi. Nuodex' motion to dismiss.
Under advisement.
Defendant King's motion to extend time to answer is postponed.

Mar. 1 Reporter's transcript of Argument of Mr. Joseph S. Ransmeier on defendant Nuodex' Motion to Dismiss.

Mar. 4 Plaintiff's Memorandum Opposing Defendant's Motion to Dismiss.

Mar. 4 Memorandum of Law in support of defendant Nuodex Products Co., Inc.'s Motion to Dismiss the Complaint as to it for failure to state a claim upon which relief can be granted.

Mar. 29 On motion of defendant, Nuodex Products Co., Inc., to dismiss, the following Order "So much of the defendant Nuodex Products Co.'s motion as relates to dismissal of the action because the complaint fails to state a claim upon which relief can be granted, is denied. The remainder of the motion has not yet been heard." Connor, J.

Mar. 29 On plaintiff's motion for order granting plaintiff leave to take oral depositions, the following order: "It not appearing that an order is required, the motion is denied." Connor, J.

Oct. 20 Answer of defendant, E. & F. King & Co., Inc.
Cross Claim of defendant, E. & F. King & Co., Inc.

Oct. 21 Motion of defendant Nuodex Products Co., Inc., to Dismiss Cross-Claim of E. & F. King & Co., Inc., and Certificate of Service.

Oct. 26 Hearing is had on question of jurisdiction and continues throughout the day.

Oct. 27 Hearing on question of jurisdiction is resumed and continues throughout the day.

Oct. 28 Hearing on question of jurisdiction is resumed and continues throughout the day.

Oct. 31 Hearing on question of jurisdiction is resumed and continues throughout the day. Plaintiff's oral evidence is closed.
Depositions to be taken later on agreement of the parties.
Defendant King's oral evidence is closed.
Hearing continued sine die. Connor, J.

Nov. 28 Hearing is had on question pertaining to deposition. Taken under advisement. Order forthwith. Connor, J.
Deposition of Charles J. Gotthardt.

Dec. 1 Order, Connor, J., that deponent, Charles J. Gotthardt is not required to answer question submitted.

Dec. 2 Reporter's Hearing on Question of Jurisdiction (4 Vols.)

Dec. 2 Motion of defendant Nuodex Products Co., Inc., that deposition of Gotthardt be not closed.

Dec. 5 Hearing is had on above motion. "Counsel does not desire to press. A. J. C."

Dec. 12 Deposition of Cornelius Zabriski.

Dec. 22 Order, Connor, J., rejecting offer of exhibits by defendant Nuodex Products Co., Inc.

Dec. 27 Plaintiff's Brief in Opposition to Defendant Nuodex' Motion to Dismiss for Lack of Jurisdiction, together with Factual Memorandum in Support of Plaintiff's Brief.

1956

Jan. 3 Brief of defendant Nuodex Products Co., Inc., in support of its motion to dismiss the complaint as to it for want of jurisdiction.

Memorandum of E. & F. King & Co., Inc., in opposition to motion of Nuodex to Dismiss, and Certificate of Service.

Request of E. & F. King & Co., Inc., for Findings and Rulings.

Jan. 5 Table of Contents and Table of Authorities for use in connection with Brief of Nuodex Products Co., Inc.

Apr. 18 Opinion, Connor, J., finding Nuodex not being subject to service within this district, the return must be quashed and action dismissed.

Apr. 18 Order, Connor, J., in conformity with opinion, quashing return as to Nuodex Products Co., Inc., and dismissing action.

Apr. 25 Plaintiff's Notice of Appeal from order of April 18, 1956, and Certificate of Service.

Apr. 26 Motion of defendant E. & F. King & Co., Inc., to amend and supplement findings of fact.

May 2 Answer of defendant Nuodex Products Co., Inc., to motion of defendant King Company to amend and supplement findings of fact.

May 22 Hearing is had on motion of defendant, E. & F. King & Co., Inc., to amend and supplement findings of fact. Taken under advisement. Connor, J.

May 31 Above motion denied. Connor, J.
Record certified to Circuit Court of Appeals.

COMPLAINT

(Caption Omitted)

Now comes W. H. Elliott & Sons Co., Inc., plaintiff, and complaining of E. & F. King & Co., Incorporated, and Nuodex Products Co., Inc., defendants, as and for its cause of action, says:

1. Jurisdiction is founded on diversity of citizenship under 28 U. S. C. A. *s.* 1332. W. H. Elliott & Sons Co., Inc., plaintiff herein, is a New Hampshire corporation with principal place of business in Madbury, in the State of New Hampshire, in this District, the defendant E. & F. King & Co., Incorporated is a Massachusetts corporation with principal place of business at 640 Pleasant Street, Norwood, Commonwealth of Massachusetts; the defendant Nuodex Products Co., Inc., is a New York corporation with principal place of business at 1 Virginia Avenue, Newark, State of New Jersey. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, being Three Hundred Thousand Dollars ($300,000).

2. The defendant King Company, being a foreign corporation, was, before, on, and after June 8, 1954, and now is transacting business in this state but failed to appoint a registered agent upon whom service of legal process may be had, and thereby the Secretary of State of the State of New Hampshire is irrevocably authorized as the agent and representative of such foreign corporation to accept service of process under Section 4 of Chapter 206 Revised Laws of New Hampshire as amended by Chapter 206, Session Laws of 1949.

3. The defendant Nuodex Company, being a foreign corporation, was, before, on, and after June 8, 1954, and now is transacting business in this state but failed to appoint a registered agent upon whom service of legal process may be had, and thereby the Secretary of State of the State of New Hampshire is irrevocably authorized as the agent and representative of such foreign corporation to accept service of process under Section 4 of Chapter 206 Revised Laws of New Hampshire as amended by Chapter 206, Session Laws of 1949.

Count I

4. Plaintiff on June 8, 1954 and for a long time prior thereto was, and was known to the defendants as, a cultivator of roses operating commercial greenhouses in Madbury, New Hampshire and selling its roses in New England and New York markets.

5. The defendant King Company is and for many years has been a manufacturer of paint, including No. 1004 Greenhouse White paint for use inside of greenhouses, and knew, or in the exercise of reasonable care should have known, that mercury vapor is injurious to plants and particularly to roses and that paint which contained ingredients which were capable of radiating such vapors is not fit and proper for use inside greenhouses, and it was the duty of this defendant not to sell to the public, including the plaintiff, paint which contained such unstable mercuric materials.

6. The defendant Nuodex Company is and for many years, directly and through subsidiaries, has been a manufacturer of fungicides, including a fungicidal material for greenhouse paints known as "Super-Ad-it," and knew, or in the exercise of reasonable care should have known, that mercury vapor is injurious to plants and particularly to roses and that fungicides which include ingrediants which, when mixed with greenhouse paint, are capable of radiating such vapors are not fit and proper for use in paint sold for use inside greenhouses, and it was the duty of this defendant not to sell fungicides to the public or to others for inclusion in products to be sold for use in greenhouses to the public, including this plaintiff, when in such combinations unstable mercuric materials would be produced.

7. Nevertheless, the defendant Nuodex manufactured "Super-Ad-it" and sold the same as and for a fungicide safe and proper for addition to greenhouse paint, and knew, or in the exercise of due care should have known that "Super-Ad-it" contained mercury in an unstable form when combined with such paint and applied inside greenhouses, which would cause injury to plants, including rose bushes, in the greenhouse where the paint was used, to the damage of purchasers of the paint containing the fungicide, including the plaintiff.

8. The defendant King Company negligently added "Super-Ad-it" to its No. 1004 Greenhouse White paint, either knowing that the fungicide contained unstable mercury which would cause injury to plants in greenhouses in which the paint was used, or having insufficient knowledge of the characteristics of the additive and failing to ascertain whether it would cause such injury; and negligently failed to ascertain that when the "Super-Ad-it" was mixed with its No. 1004 Greenhouse White paint and applied within greenhouses, the mercury would become volatile and

mercury vapors would be radiated to the injury of plants in the greenhouses and to the damage of the purchasers of the paint, including the plaintiff.

9. Plaintiff purchased 250 gallons of No. 1004 Greenhouse White paint from the defendant King Company between June 8 and August 13, 1954 which paint was manufactured by said defendant King Company, and contained "Super-Ad-it" manufactured by the defendant Nuodex Products Company, and applied the paint inside of two greenhouses in Madbury, in the exercise of due care, and thereafter, as a result of applying said paint inside the said greenhouses, the growth of seventy thousand (70,000) rose bushes was inhibited, interfered with, and permanently impaired in a manner which reduced the production of roses on said bushes both in quantity and in quality to an extent that plaintiff's cultivation of said roses is conducted at a loss, and contaminated the soil in which said plants are cultivated, thereby (1) destroying the value of said plants, (2) requiring their replacement, (3) destroying the value of the soil and requiring its replacement, (4) depriving plaintiff of the usual production of roses from said seventy thousand (70,000) bushes until replaced and until the replacement rose bushes are capable of commercial production, and (5) rendered plaintiff incapable of furnishing satisfactory roses to all of its customers thereby injuring plaintiff's business reputation which damage continues and in the future will continue.

WHEREFORE plaintiff demands judgment against the defendants in the sum of Three Hundred Thousand Dollars ($300,000) and costs.

COUNT II

10. Paragraphs 1, 2, 3, 4, and 5 are made part of this Count by reference.

11. On various dates between June 8 and August 13, 1954, plaintiff purchased from the defendant King Company five lots of ten five-gallon cans each of No. 1004 Greenhouse White paint, the purchases totalling 250 gallons of said paint.

12. The defendant King Company expressly and by implication warranted to the plaintiff Elliott Company that the said No. 1004 Greenhouse White paint and its ingredients were safe, fit, and proper for use inside plaintiff's greenhouses in which plaintiff cultivates roses for commercial purposes and that said paint

could be so used without damage to the rose bushes or roses cultivated therein and without inhibiting future growth of said plants.

13. Defendant Nuodex Products Company, prior to June 8, 1954, had expressly and by implication warranted to the defendant King Company, for the benefit of purchasers of King Company's paints, including this plaintiff, that a certain fungicide manufactured by Nuodex and known as "Super-Ad-it" was a fit and proper ingredient to be added to paint to be sold for use inside greenhouses such as those of plaintiff in which said paint was used and would be beneficial to said users of said paint.

14. The defendant King Company, prior to shipment of the said No. 1004 Greenhouse White paint to the plaintiff, and unknown to the plaintiff, added "Super-Ad-it" to said paint which plaintiff alleges, on information and belief, contained substances which were capable of releasing noxious fumes or vapors including mercury vapors.

15. Plaintiff, relying on the skill and judgment of the defendant King Company and its said warranties of the fitness of the said No. 1004 Greenhouse White paint, on divers dates between June 11 and September 4, 1954, in the exercise of due care, did use and apply said paint to the interior of two certain greenhouses located in Madbury in said county and State of New Hampshire in which thousands of rose bushes were in cultivation.

16. Thereafter, as a result of applying said paint inside the said greenhouses, the growth of some seventy thousand (70,000) rose bushes was inhibited, interfered with; and permanently impaired in a manner which reduces the production of roses on said bushes, both quantitatively and qualitatively, to an extent that plaintiff's cultivation of said rose bushes is conducted at a loss, and requires the replacement of said rose bushes, and the soil in which they are cultivated.

17. Plaintiff alleges, on information and belief, that the damage to the said rose bushes is caused by the emission from the said paint of vapors including mercury vapor from which noxious substances are absorbed by the susceptible rose bushes and are retained in the said plants thereafter; that the source of the said vapors is the fungicide, manufactured by the defendant Nuodex Company and added to the paint of the defendant King Company by that Company.

18. The unsuitability of the paint for use within the greenhouses was not such as ought to have been revealed by an examination of the same by the plaintiff, and no warning of the mercuric ingredients was given by the defendants to plaintiff.

19. Replacement of said rose bushes is not feasible or possible, because of the requirements of their cultivation and culture, prior to January of 1955, and commercial production from new rose bushes if transplanted in January cannot be anticipated prior to April of 1955.

20. Plaintiff's cost of operating its greenhouses continues and will continue until April, 1955, as before the sustaining of said damage and is not affected by the damage, since the greenhouses must still be maintained and heated, and the plants cultivated even though not producing.

21. The loss of the production of the said seventy thousand (70,000) rose bushes constitutes a loss of nearly one-third plaintiff's rose production, renders plaintiff unable to supply roses to many present accounts, and causes and will in the future cause damage to plaintiff's business through the loss of accounts and damage to plaintiff's business reputation.

WHEREFORE, plaintiff demands judgment against the said defendants in the sum of Three Hundred Thousand Dollars ($300,000), together with the costs of this action.

W. H. Elliott & Son Co., Inc.
By Stanley M. Brown and
McLane, Carleton, Graf, Greene & Brown
By Stanley M. Brown
Plaintiff's Attorney
40 Stark St., Manchester, N. H.

Plaintiff desires and demands a jury trial.

W. H. Elliott & Son Co., Inc.
By Stanley M. Brown and
McLane, Carleton, Graf, Greene & Brown
By Stanley M. Brown
Its Attorney
40 Stark St., Manchester, N. H.

MOTION TO DISMISS

(Caption Omitted)

Now comes the defendant Nuodex Products Co., Inc., and moves the Court as follows:

(1) To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc., upon which relief can be granted.

(2) To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc., is a corporation organized under the laws of the State of New York, which has never done business within The State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire.

NUODEX PRODUCTS CO., INC.
By SULLOWAY, JONES, HOLLIS & GODFREY
Its Attorneys

November 12, 1954

ORDER OF MARCH 29, 1955

"So much of the defendant Nuodex Products Co.'s motion as relates to dismissal of the action because the complaint fails to state a claim upon which relief can be granted; is denied. The remainder of the motion has not yet been heard." Connor, J.

ANSWER OF E. & F. KING & CO., INCORPORATED

(Caption Omitted)

Now comes E. & F. King & Co., Incorporated, defendant in the above-entitled complaint, and for answer says:

1. It admits the jurisdictional allegations of paragraph 1 of said complaint.

2. It admits the allegations of paragraph 2 of said complaint.

3. It admits the allegations of paragraph 3 of said complaint.

COUNT I

4. It admits that on June 8, 1954 and prior thereto the said plaintiff was known to this defendant as the operator of commercial greenhouses. It denies the remaining allegations of paragraph 4 of said complaint.

5. It admits that it is and for many years has been a manufacturer of paint, including No. 1004 Greenhouse White paint

for use in painting greenhouses. It denies the remaining allegations of paragraph 5 of said complaint.

6. The matters alleged in paragraph 6 of said complaint do not pertain to any claim asserted by the plaintiff against this defendant, and no answer thereto is required.

7. The matters alleged in paragraph 7 of said complaint do not pertain to any claim asserted by the plaintiff against this defendant.

8. It denies the allegations of paragraph 8 of said complaint.

9. It admits that the plaintiff purchased 250 gallons of No. 1004 Greenhouse White paint from the defendant King Company between June 8 and August 13, 1954, which paint was manufactured by King Company and contained "Super-Ad-it" manufactured by the defendant Nuodex Products Company. It is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff applied the paint inside two greenhouses in Madbury in the exercise of due care. It denies the remaining allegations of paragraph 9 of said complaint.

COUNT II

10. It reiterates its answer to paragraphs 1, 2, 3, 4, and 5 and incorporates the same herein by reference in answer to paragraph 10 of said complaint.

11. It admits the allegations of paragraph 11 of said complaint.

12. It denies the allegations of paragraph 12 of said complaint.

13. It admits the allegations of paragraph 13 of said complaint.

14. It admits that prior to shipment to the plaintiff by the defendant of the said paint "Super-Ad-it" was added to said paint by this defendant. It is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 14 of said complaint.

15. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of said complaint.

16. It denies the allegations of paragraph 16 of said complaint.

17. It denies the allegations of paragraph 17 of said complaint.

18. It denies the allegations of paragraph 18 of said complaint.

19. It denies that the plaintiff has been damaged as alleged in paragraph 19 of said complaint.

20. It denies that the plaintiff has been damaged as alleged in paragraph 20 of said complaint.

21. It denies that the plaintiff has been damaged as alleged in paragraph 21 of said complaint.

WHEREFORE the said defendant E. & F. King & Co., Incorporated, prays that said complaint may be dismissed and for its costs.

E. & F. KING & CO., INCORPORATED
By its Attorneys
UPTON, SANDERS & UPTON

CROSS-CLAIM

(Caption Omitted)

Now comes E. & F. King & Co., Incorporated, hereinafter referred to as King Company, and, pursuant to the provisions of Rule 13 (g) of Civil Procedure, in cross-claim against the defendant Nuodex Products Co., Inc., hereinafter referred to as Nuodex, says:

1. The defendant King Company is a corporation duly organized under the laws of the Commonwealth of Massachusetts and is now and has been doing or transacting business in the State of New Hampshire. The defendant Nuodex is a corporation duly organized under the laws of the State of New York and is now and has been doing or transacting business in the State of New Hampshire. The plaintiff is a corporation duly organized under the laws of the State of New Hampshire and has its principal place of business in said State.

The defendant Nuodex on or about November 12, 1954 by motion filed herein moved: "1. To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc., upon which relief can be granted" and "2. To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc., is a corporation organized under the laws of the State of New York, which has never done business within the State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire". Thereafter the defendant Nuodex brought forward for hearing its motion to dismiss because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc., upon which relief can be granted, and the Court, after hearing the plaintiff and Nuodex therein both orally and by written argument on

March 29, 1955 denied said motion, as appears by the order entered herein.

Nuodex, by invoking the judgment of this Court as to whether the plaintiff's complaint stated a claim upon which relief could be granted against it, waived all jurisdictional questions and thereby submitted itself to the jurisdiction of the Unted States District Court for the District of New Hampshire to determine each and every issue raised by the allegations of said complaint and of this cross claim.

2. King Company is now and for a long time has been engaged in manufacturing and selling paints, including paints to be applied to the interiors and exteriors of greenhouses. Nuodex is now and for a long time has been engaged in manufacturing and selling fungicides, particularly including a compound called "Super-Ad-it", for addition to or use in paints including greenhouse paints.

COUNT I

3. In consideration that the King Company at the request of Nuodex, its agents and servants, would purchase of Nuodex a certain ingredient or fungicide known as "Super-Ad-it", Nuodex expressly promised and warranted that "Super-Ad-it" was a desirable and harmless ingredient or fungicide suitable and fit to be added to or used in all paints being made or manufactured by King Company, including paints being so manufactured and sold for the painting of greenhouses, and without limiting the generality of the foregoing, expressly promised and warranted that "Super-Ad-it" was stable, nonvolatile, nontoxic, nonreactive when used in paint, and would provide fungicidal effectiveness without affecting the properties and stability of any paint.

4. In reliance upon said promises and warranties of Nuodex, King Company at various times purchased sundry lots or quantities of "Super-Ad-it" from and paid Nuodex therefor. In further reliance upon said promises and warranties, King Company added "Super-Ad-it" to or used it in various paints being manufactured by it, including its so-called "No. 1004 Greenhouse White Paint".

5. Between June 9, 1954 and August 16, 1954 King Company sold and delivered to the plaintiff five lots of 50 gallons each of said greenhouse paint with "Super-Ad-it" added thereto or used therein.

6. The plaintiff in this action claims that "Super-Ad-it" con

tained mercury which, after application of said paint to the plaintiff's greenhouses, vaporized or otherwise acted or reacted in such manner as to injure rose bushes or roses being grown by the plaintiff in its greenhouses, causing substantial damage to the plaintiff, as more particularly appears in said complaint.

7. If the plaintiff suffered injury or damage for the reasons and in the manner alleged, all of which is denied by King Company as appears by its answer to said complaint, "Super-Ad-it", contrary to the aforesaid promises and warranties by Nuodex to King Company, was not desirable and harmless, was not suitable and fit to be added to said greenhouse paint, but in fact was unstable, volatile, toxic, and reactive when used in said paint, and harmfully affected the properties and stability of said paint. King Company seasonably and duly notified Nuodex that if the plaintiff had in fact suffered injury or damage for the reasons and in the manner alleged by it, such injury or damage had resulted from or been caused by the breach by Nuodex of its aforesaid promises and warranties.

8. If King Company is found liable to the plaintiff in damages, King Company, as a consequence of the breach of said promises and warranties by Nuodex, is entitled to recover against Nuodex the amount of such damages together with all expenses incurred by it in defending against the claim of the plaintiff.

COUNT II

9. At various times King Company purchased sundry lots or quantities of "Super-Ad-it" from and paid Nuodex therefor and in making said purchases informed Nuodex that it required "Super-Ad-it" for addition to or use in paints being manufactured and sold by King Company, including its greenhouse paint. Each purchase of "Super Ad-it" from Nuodex was made in reliance by King Company upon the skill or judgment of Nuodex that "Super-Ad-it" was reasonably fit for addition to or use in the aforesaid paints, and thereby in so selling "Super-Ad-it" to King Company, Nuodex impliedly warranted to King Company that "Super-Ad-it" was reasonably fit for the particular purpose for which King Company had informed Nuodex it required "Super-Ad-it".

10. Thereafter and in further reliance upon said implied warranty, King Company added "Super-Ad-it" to or used it in various paints being manufactured and sold by it, including said green-

house paint. Between June 9, 1954 and August 16, 1954 King Company sold and delivered to the plaintiff five lots of fifty gallons each of said greenhouse paint containing "Super-Ad-it".

11. The plaintiff in this action claims that "Super-Ad-it" contained mercury, which, after application of said paint to plaintiff's greenhouses vaporized or otherwise acted or reacted in such manner as to injure rosebushes or roses being grown by the plaintiff in its greenhouses, causing substantial damage to the plaintiff as more particularly appears in said complaint.

12. If the plaintiff suffered injury or damage for the reasons and in the manner alleged, all of which is denied by King Company as appears by its answer to said complaint, "Super-Ad-it", contrary to the implied warranty by Nuodex that it was reasonably fit for addition to or use in said greenhouse paint, was not suitable and fit to be so added or used and because of its unfitness for such use, harmfully affected the properties and stability of said paint. King Company seasonably and duly notified Nuodex that if the plaintiff had in fact suffered injury or damage for the reasons and in the manner alleged by it, such injury or damage had resulted from or been caused by the breach by Nuodex of its aforesaid implied warranty.

13. If King Company is found liable to the plaintiff in damages, King Company, as a consequence of the breach by Nuodex of said implied warranty, is entitled to recover against Nuodex the amount of such damages together with all expenses incurred by it in defending against the claim of the plaintiff.

COUNT III

14. At various times previous to August 16, 1954 Nuodex represented to King Company that "Super-Ad-it" was a desirable and harmless ingredient or fungicide and fit to be added to or used in all paints being manufactured and sold by King Company, including its greenhouse paint, and without limiting the generality of the foregoing Nuodex represented that "Super-Ad-it" was suitable, nonvolatile, nontoxic, and nonreactive when used with any paint being manufactured and sold by King Company, that "Super-Ad-it" would provide fungicidal effectiveness without affecting the properties and stability of said paint, and without any warning that it was unsuitable and unfit for addition to or use in greenhouse paint. In reliance upon said representations King Company at various times purchased sundry lots or quantities of "Super-Ad-it" from and paid Nuodex therefor. In fur-

ther reliance upon said representations King Company added "Super-Ad-it" to or used it in various paints being manufactured and sold by King Company, including said greenhouse paint.

15. Between June 9, 1954 and August 16, 1954 King Company sold and delivered to the plaintiff five lots of fifty gallons each of said greenhouse paint with "Super-Ad-it" added thereto or used therein.

16. The plaintiff claims that said "Super Ad-it" contained mercury, which after application of said paint to the plaintiff's greenhouses vaporized or otherwise acted or reacted in such manner as to injure rosebushes or roses being grown by the plaintiff in its greenhouses, causing substantial damage to the plaintiff, as more particularly appears from said allegations.

17. If the plaintiff suffered injury or damage for the reasons and in the manner alleged, all of which is denied by King Company as appears by its answer to said complaint, "Super-Ad-it", contrary to the aforesaid representations by Nuodex to King Company, was not desirable and harmless, was not suitable and fit to be added to said greenhouse paint, but was unsuitable and unfit, volatile, toxic, and reactive when used in said paint and harmfully affected the properties and stability of said paint, all of which in the exercise of due and reasonable care should have been known to Nuodex, and Nuodex was careless and negligent in making the representations set forth in paragraph 14 and was further careless and negligent in selling "Super-Ad-it" to King Company without warning of such dangerous qualities or properties of "Super-Ad-it".

18. If King Company is found liable to the plaintiff in damages, King Company, as a consequence of the carelessness and negligence of Nuodex as aforesaid, is entitled to recover against Nuodex the amount of such damages, together with all expenses incurred by it in defending against the claim of the plaintiff.

WHEREFORE the said defendant, E. & F. King & Co., Incorporated, in the event it is held liable to the said plaintiff, W. H. Elliott & Sons Co., Inc., prays for judgment against the said defendant, Nuodex Products Co., Inc., in the amount of its liability to the said plaintiff together with all expenses incurred by

E. & F. King & Co., Incorporated, in defending against the said complaint, and for such other and further relief as may be just.

E. & F. KING & CO., INCORPORATED
By its Attorneys
UPTON, SANDERS & UPTON

EXHIBIT 3

NUODEX PRODUCTS IN NEW HAMPSHIRE

Reference	Date	Account	Item
	1950		
	Mar. 20	Milford Paint	Salesman Johnson visited re Nuodex dryers
	May 4	Milford Paint	Johnson visited re Nuodex dryers
	June 14	Milford Paint	Johnson visited re Nuodex dryers
	Sept. 27	Resin Research, Manchester	Johnson visited re Nuodex No. 6
	1951		
2	Jan. 5	Putnam Mfg. Co., Keene	Cobalt shipped, $78.50
(Cor 51 NH)	Jan. 20	Nashua Gummed & Coated Paper	Johnson visited
	Feb. 3	Nashua Gummed & Coated Paper	Nuodex 84 shipped $223.75
	Feb. 5	Putnam Mfg. Co., Keene	Cobalt shipped, $78.50

Reference	Date	Account	Item
	Feb. 21	Tintomatic Corp., Goffstown	Letter, Nuodex to Rhynes re business
	April 6	Nashua Gummed & Coated Paper	$223.75 order of Nuodex 84 shipped
2	May 9	Johns-Manville	Zinc and iron order shipped
11	May 10	Manchester Narrow Fabrics Milford Paint	Johnson visited and reported to Nuodex
(Cor 51 NH)	June 11	American Twine & Fabric Co., Salmon Falls	American Twine wrote Litter Co., requesting conference at Portsmouth
"	June 14	American Twine & Fabric Co.,	Conference at Portsmouth held re Nuodex products
"	June 15	American Twine & Fabric Co.,	Cookingham of Litter Co. reports to Houston of Nuodex re conference

NCE	DATE	ACCOUNT
	July 9	Nashua Gummed & Coated Paper
	Aug. 16	Milford Paint Miljo Chemical
	Aug. 20	Milford Paint
	Aug. 21	Putnam Mfg. Co.
	Aug. 27	American Twine & Fabric Co.,
	Aug. 29	American Twine & Fabric Co.,
	Aug. 30	Putnam Mfg. Co.
l NH)	Aug. 31	Milford Paint
	Oct. 22	Putnam Mfg. Co.

ITEM

Nuodex No. 84 shipped $223.75

Salesman Johnson visited re Nuodex

Salesman Johnson visited

Salesman Johnson visited re Nuodex

Test report by Nuodex on problem

Cookingham reports to Houston of Nuodex on situation

Nuodex sends free sample of Nuact Paste

Nuodex sends sample of Nuomix to Milford

Nuodex sends 4-oz. of Super-Ad-It to Putnam

Date	Account
Oct. 31	Johns Manville
Nov. 5	Putnam Mfg. Co.
Oct. 15	Milford Paint
Nov. 20	Milford Paint
1952	
Feb. 2	Resin Research
Feb. 7	Milford Paint
Feb. 13	Nashua Corporation
Feb. 26	Milford Paint

ITEM

Nuodex zinc shipped

Cobalt order shipped $51.25

Salesman Johnson visits re Nuodex

Salesman Johnson visits and reports "We will get dryer business."

Cobalt order shipped $41.50

Exkin order shipped $45.50

Nuodex No. 84 order shipped $213.75

Salesman Johnson visits re Nuodex

Date	Account
Feb. 26	New Englant Paint Works, Goffstown
Feb. 26	New Englant Paint Works
Feb. 26	Nashua Gummed & Coated Paper
Feb. 29	Nashua Gummed & Coated Paper
Mar. 12	Putnam Mfg. Co.
May 27	Johns-Manville
June 4	Milford Paint
June 11	Milford Paint
June 18	Milford Paint

ITEM

Salesman Johnson visits re Nuodex

Salesman Johnson visits

Salesman Johnson visits re Nuodex

One quart cobalt sample sent by Nuodex, on Johnson's request

Manganese order shipped $29.00

Zinc order shipped

Nuodex Lead order shipped $106.88

Salesman Johnson visits re Nuodex

Nuodex Paste shipped $30.84

Reference	Date	Account	Item
	June 19	Johns-Manville	Zinc order shipped
	July 10	Milford Paint	Salesman Johnson visits
	July 26	Nashua Corporation	Johnson writes that Nuodex samples will be sent
	July 28	Milford Paint	Cobalt order shipped $183.83
	Aug. 11	New England Paint	Free sample of Nuodex product sent to Goffstown
	Aug. 20	Milford Paint	Salesman Johnson visits re Nuodex
	Aug. 29	New England Paint	Nuodex sends free sample of product

Reference	Date	Account	Item
	Sept. 10	Nashua Corporation	Nuodex No. 94 order shipped $427.50
	Oct. 13	Milford Paint	Lead order shipped $106.88
	Oct. 24	H & H Chemical, Epping, N. H.	Houston of Nuodex writes Haugh thanking him for order
	Oct. 27	H & H Chemical	Order of Super-Ad-It shipped $15.00
	Nov. 19	Johns-Manville	Zinc order shipped
	1953		
D.P. 90	Feb. 10	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 90		Milford Paint	Johnson visited re Super-Ad-It Nuodex dryers

Reference	Date	Account	Item
D.P. 91		International Shoe	Johnson visited
D.P. 92		Hermsdorf Fixtures	Johnson visited
D.P. 93		New England Paint, Goffstown	Johnson visited re Nuodex dryers
	Feb. 17	F. A. Putnam Mfg. Co.	Cobalt and Manganese shipped $29.00
D.P. 89	Mar. 9	F. A. Putnam Mfg. Co.	Nuact paste, Johnson visited
	Mar. 20	Johns-Manville	Zinc and Nuodex Iron shipped
D.P. 88	Mar. 26	Nashua Corporation	Johnson visited Re Nuodex 84
D.P. 89		Milford Paint	Johnson visited re Nuodex dryers Super-Ad-It
	Apr. 1	Resin Research	Cobalt Order shipped
D.P. 86, 87	Apr. 8	Great Falls Bleachery	Cookingham and Galbraith re Nuodex 100

Reference	Date	Account	Item
	Apr. 10	Great Falls Bleachery	Nuodex No. 100 WD order shipped
	Apr. 17	Resin Research	Cobalt order shipped $56.75
	Apr. 20	Nashua Corporation	Nuodex No. 84 order shipped $213.75
	May 19	Great Falls Bleachery	Nuodex No. 100 WD order shipped
D.P. 84 85	May 28	Nashua Corporation	Johnson visited
D.P. 82	June 3	Miljo Chemical	Johnson visited
		General Electric	Johnson visited
		Great Falls Bleachery	Johnson visited re Nuodex 100
D.P. 81	July 7	F. A. Putnam Mfg. Co. Keene	Johnson visited re Nuodex Zirconium
	July 15	F. A. Putnam Mfg. Co.	Cobalt and Manganese shipped $80.75

Reference	Date	Account	Item
	July 17	F. A. Putnam Mfg. Co.	Free sample of Nuodex products shipped
D.P. 78	Aug. 13	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 78		Milford Paint	Johnson visited re Nuodex cobalt
D.P. 80		International Shoe	Johnson visited
D.P. 81		Hermsdorf Fixtures Manchester	Johnson visited
D.P. 75	Aug. 31	Miljo Chemical	Johnson visited
D.P. 75		General Electric	Johnson visited
D.P. 76		Great Falls Bleachery	Johnson visited re Nuodex 100 WD
D.P. 73	Sept. 22	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 74		Milford Paint	Johnson visited re Nuodex dryers
D.P. 75		International Shoe	Johnson visited re Vinyl Stabilizers

Reference	Date	Account	Item
	Oct. 1	F. A. Putnam Mfg. Co.	1 gallon of Super-Ad-It shipped $15.52
D.P. 72	Nov. 10	Nashua Corporation	Johnson visited
		International Shoe	Johnson visited
D.P. 73		Milford Paint	Johnson visited re Nuodex dryers
	Nov. 15	Simplex Wire & Cable Co., Portsmouth, N. H.	Nuodex No. 209 order shipped $292.40
D.P. 71	Nov. 30	Milford Paint	Johnson makes a phone call re bill
	Dec. 7	Great Falls Bleachery	Nuodex 100 WD order shipped
D.P. 69	Dec. 16	Nashua Corporation	Johnson visited
D.P. 70		Milford Paint	Johnson visited re Nuodex dryers
	Dec. 28	Great Falls Bleachery	Nuodex 100 WD order shipped

Reference	Date	Account	Item
	1954		
	Jan. 15	Great Falls Bleachery	Order of Nuodex 100 WD shipped
	Jan. 20	Johns-Manville	Nuodex zinc order shipped
	Feb. 1	Resin Research	Order of cobalt shipped
	Mar. 18	Simplex Wire & Cable	Order of Nuodex 209 shipped $292.40
	Apr. 19	Great Falls Bleachery	Nuodex 100 WD shipped
	May 4	Resin Research	Three free samples sent
	May 19	Great Falls Bleachery	Nuodex 100 WD shipped
	June 3	F. A. Putnam Mfg. Co.	Order of Nuodex Cobalt shipped
	June 8	Johns-Manville	Nuodex zinc shipped

Reference	Date	Account	Item
	June 11	Great Falls Bleachery	Nuodex 100 WD shipped
	June 28	Great Falls Bleachery	Nuodex 100 WD shipped
D.P. 67, 68	July 13	Milford Paint	Johnson visited re Nuodex dryers
		Miljo Chemical	Johnson visited
		F. A. Putnam Mfg. Co.	Johnson visited re
		Keene	Nuodex dryer
			Nuosperse
	July 14	Great Falls Bleachery	Nuodex 100 WD shipped
	July 19	Johns-Manville	Nuodex zinc shipped
	July 23	Resin Research	Nuodex cobalt order shipped
	Aug. 27	Simplex Wire & Cable	Nuodex 209 shipped
	Sept. 7	Resin Research	Two free samples of Nuodex products shipped

Reference	Date	Account	Item
	Sept. 16	Nashua Corporation	Free sample of cyclodex shipped
D.P. 65	Sept. 22	New England Chemical	Johnson visited
D.P. 66		Milford Paint	Johnson visited re Super-Ad-It
	Sept. 28	Great Falls Bleachery	Nuodex 100 WD shipped
D.P. 62, 63	Oct. 5	General Electric, Somersworth	Johnson visited
D.P. 64		Great Falls Bleachery	Johnson visited re Nuodex 100
D.P. 65		Miljo Chemical	Johnson visited re Nuosperse
	Oct. 6	Great Falls Bleachery	Nuodex 100 WD shipped
	Oct. 13	Great Falls Bleachery	Nuodex 100 WD shipped
D.P. 59	Nov. 1	Nashua Corporation	Johnson visited re Nuostaves

Reference	Date	Account	Item
D.P. 60		International Shoe Manchester	Johnson visited re Nuostaves
D. P. 59		New England Cable Concord	Johnson visited re Nuostaves Vinyl Stabilizers
	Nov. 10	Great Falls Bleachery	Nuodex 100 WD shipped
	Nov. 29	Great Falls Bleachery	Nuodex 100 WD shipped
(Misc.)	Dec. 30	Great Falls Bleachery	Salesman Johnson visits Somersworth plant
	1955 Jan. 3	Great Falls Bleachery	4 doz. Nuophene samples shipped
D.P. 52	Jan. 4	Great Falls Bleachery	Johnson visited re Nuophene, Nuodex 100
D.P. 55		General Electric Somersworth	Johnson visited

Reference	Date	Account	Item
D.P. 56		Miljo Chemical Exeter	Johnson visited re Nuosperse
D.P. 45	Jan. 12	Nashua Corporation	Johnson visited re Nuodex 84
D.P. 46	Jan. 12	New England Chemical Supply	Johnson visited
D.P. 47		Milford Paint	Johnson visited re Nuolate dryers
D.P. 50		Hampshire Manufacturing	Johnson visited re Vinyl stabilizers
	Jan. 18	Nashua Corporation	Nuodex 84 shipped $213.75
	Jan. 27	Resin Research	Cobalt order shipped $47.75
	Feb. 10	Great Falls Bleachery	Nuodex 100 WD shipped
	Feb. 28	F. A. Putnam Mfg. Co.	Nuodex cobalt shipped $31.00
	Mar. 9	Great Falls Bleachery	Nuodex 100 WD shipped

Reference	Date	Account	Item
	May 4	Resin Research	Nuodex cobalt shipped $47.75
D.P. 40, 117	Mar. 17	Simplex Wire & Cable	Johnson visited re Nuodex wetting agent
"		General Electric	Johnson visited
"		Great Falls Bleachery	Johnson visited re Nuodex 100

DEPOSITION OF CHARLES J. GOTTHARDT

(Caption Omitted)

Deposition taken by agreement of the parties at the request of the Defendant King Company at the offices of Upton, Sanders & Upton, 14 Park Street, Concord, New Hampshire at 11:45 a.m., November 22, 1955.

It is agreed that the deposition may be taken in the first instance by stenotype and when transcribed may be used as the deposition of the deponent insofar as competent and material. Notice, caption, filing, and all other formalities, including signature, waived.

CHARLES J. GOTTHARDT

called as a witness in behalf of Defendant King Company, being first duly sworn by Mr. Brown, was examined and testified as follows:

Interrogatories by Mr. Sanders:

Q. What is your name? A. Charles J. Gotthardt. Q. You are how old? A. Forty-one. Q. You live where? A. Forty-nine Carey Road, Needham Heights, Massachusetts. Q. Very briefly, what was your formal education? A. Graduated from Lehigh University in 1936, doctor of science. Q. And thereafter in what types of work did you engage? A. Principally in the paint business with the initial job after graduation from college as a foreign correspondent with an importing firm in the horticultural trade. Q. In general have you been engaged in the paint business since your graduation from college? A. After the first year. Q. By whom are you presently employed? A. I am employed by the E. & F. King Company, Incorporated. Q. It has its place of business where? A. Norwood, Massachusetts. Q. Is that a Massachusetts corporation? A. Yes, it is. Q. What office do you hold in the Corporation? A. I am the vice-president of the Company. Q. Are you also a director of the Company? A. I am. Q. When did you first commence your employment with the King Company? A. March 1, 1950. Q. Have you been employed steadily since that date by this Company? A. I have. Q. And in general, just generally, what has been the nature of your duties since you commenced this employment? A. I am in charge of the entire paint operation, both manufacturing and sales. Q. Now, at some time did the King Company commence purchasing Ad-It from

Nuodex Products Company? A. Yes, it did. Q. About when did King Company commence purchasing Ad-It? A. I believe it was in the first year that I joined the Company, which would be 1950. Q. And would you just tell us about how long Ad-It was purchased by the Company from Nuodex? A. It was purchased from the time that we just referred to until the product was discontinued. Q. And the product was discontinued by Nuodex approximately when? A. In 1953, barely in 1953, I believe. Q. Through whom did King Company actually make its purchases of Ad-It? A. Well, the purchases were made through the D. H. Litter Company; purchase orders were made out to them. Q. What use, in general, did King Company make of Ad-It? A. Its sole use with King Company was for repackaging under a private label for one of its customers. Q. What was the name of that customer? A. Wilbur & Williams Company of Brighton, Massachusetts. Q. When repackaged by King Company, what use was made by Wilbur & Williams of Ad-It? A. Well, they sold it as a fungicidal additive for any and all paints, principally their own. Q. And under what name did Wilbur & Williams so sell this repackaged Ad-It? A. Sold as Fungus-ban. Q. And up until Ad-It was discontinued, as you have stated, approximately in the spring of 1953, did King Company constantly sell repackaged Ad-It to Wilbur & Williams? A. Yes. Q. And to your knowledge, whereabouts did Wilbur & Williams in turn sell this repackaged Ad-It? A. They sold it all over the United States. Q. And how about in New Hampshire? A. They had a resident salesman in New Hampshire. So obviously they were selling their products here. Q. Now, in the spring of 1953 you discontinued your repackaging of Ad-It? A. That is correct. Q. And thereafter did you purchase a successor product from Nuodex? A. We did. As soon as one was discontinued, we started with the other. Q. What was the new product? A. Super Ad-It. Q. And how long did King Company continue purchasing Super Ad-It from Nuodex after it was first sold you? A. From the spring of 1953 until September of 1954. Q. And did you; that is, King Company, repackage Super Ad-It? A. Yes, we did. Q. Tell us to what extent you did that and to whom you resold the Super Ad-It? A. Precisely the same situation occurred. Our customer was Wilbur & Williams, exclusive customer; and the amount

sold was about comparable to what had been sold prior. Q. And whereabouts was Wilbur & Williams selling the repackaged Super Ad-It? A. They were selling it through their regular outlets, once again, all over the Country. Q. And in New Hampshire? A. Yes, I believe so. Q. Now, was the repackaged Super Ad-It also sold by Wilbur & Williams under the name Fungus-ban? A. That's right. The only difference was a change in the chemical composition as indicated on the label. Q. Throughout the period you were repackaging and selling Ad-It and Super Ad-It to Wilbur & Williams did that Company have a New Hampshire agent, representative? A. Wilbur & Williams? Q. Yes. A. Yes. Q. Now, did King Company use Ad-It in any way other than in the repackaging that you have described for Wilbur & Williams? A. No. Q. Now, after you commenced, after King Company began purchasing from Nuodex Super Ad-It in the spring of 1953, did King Company make any other uses of Super Ad-It? A. Yes. We began to incorporate it in exterior paints, including greenhouse paint. Q. And did you commence that incorporation of Super Ad-It in the spring of 1953? A. Yes, experimentally at first. Q. And continued such incorporation until about when? A. Until September of 1954. Q. Now, since you have been with the Company; that is, King Company, to what extent has the Company used any other Nuodex products? A. Well, we have used great quantities of Nuodex dryers, all types of their dryers of which there are, I believe, six. We have used their anti skinning agent from the time that it came on the market, and I believe that is all we have purchased from Nuodex. Q. Now, since 1950 in what paints or other ingredients has King Company used Nuodex dryers? A. Used it in our industrial finishes, exterior paints, interior paints, and putty, certain putties. Q. In what products has King Company used the Nuodex anti skinning agent? A. In almost all of the industrial finishes that we manufacture. Q. And the use of Nuodex dryers and anti-skinning agents in the use you have described continued by King Company until about when? A. September of 1954. Q. Now, from 1950 on through whom were these Nuodex products in general purchased by King Company? A. They were always purchased from D. H. Litter. Q. Is that true regardless of what the product was? A. Yes. Q. So long as it was Nuodex? A. That's right. Q.

Now, what knowledge, if any, did Litter representatives have from 1950 to the fall of 1954 concerning the use King Company was making of Ad-It, Super Ad-It, Nuodex dryers, and Nuodex anti-skinning agents? A. In the case of Super Ad-It they knew precisely what was being done with it because they gave us instructions as to how to advise our customer to prepare his label. That also was the case with Ad-It. Insofar as Nuodex dryers and the skinning agents were concerned, they had full knowledge that they were going into paint products and putty products which we manufacture. Q. And did Litter representatives have this knowledge you have described throughout the entire period of your employment by King Company? A. Yes. Q. Now, did any Nuodex representative throughout this same period have any similar knowledge? A. Those Nuodex representatives, which called on us in conjunction with D. H. Litter certainly did. Q. What Nuodex representatives customarily called on you? A. Well, it would usually be their sales supervisor, a Frank Dwyer in particular, and his predecessor, Bill Houston. Q. Now, during the period you have been employed by King Company, has the Company had any paint and putty customers in New Hampshire? A. Yes. Q. And about how many paint and putty customers in New Hampshire during this period, 1950 to the fall of 1954, has the Company had? A. Somewhere between fifty and sixty. Q. Now, did the paint and putty being purchased by these fifty to sixty New Hampshire customers over this period contain some Nuodex product? A. Yes, with the exception of items which we did not manufacture, but only resold, including something perhaps made by the National Gypsum Company or the Coppers Company. Q. How many of these fifty to sixty paint or putty New Hampshire customers would you say were customarily regularly purchasing a King paint or putty which had a Nuodex product embodied in it? A. I would say all of them. Q. Now, after Super Ad-It was embodied in King Company paints, commencing in the spring of 1953 and up to the fall of 1954, how many of these New Hampshire customers were purchasing King Company paints which had Super Ad It embodied in them? A. About forty. Q. Can you tell me the approximate dollar volume of paint sold by King Company to New Hampshire customers during 1953 which paint had Super Ad-It embodied in it? A. That is a rather difficult question. We sold about

two thousand gallons of paint that contained Super Ad-It during that period in New Hampshire at an average selling price of about three fifty a gallon. That would be roughly $7,000. Q. That is with Super Ad-It? A. That's right. Q. Now, can you give me the approximate dollar volume of paints and putties sold by King Company in New Hampshire during the year 1953 which had a Nuodex products embodied in them? A. I believe that would be about thirty-seven thousand. I have a roster of my sales. That figure could be checked. Q. Now, could you give me the similar dollar volume for the year 1954? A. Forty-four thousand. Q. Now, could you tell us about how many gallons of King Company paint with Super Ad-It embodied therein were sold by the Company to New Hampshire customers in the year 1954? A. Approximately 2,500 gallons. Q. And in dollar volume that would represent what? A. That would represent the same formula that I used before of average selling price of $3.50 per gallon times 2,500. Q. Now, throughout the period you have been employed by King Company has the Company had any salesman or salesmen regularly seeing customers and selling King Company products in New Hampshire? A. Yes. Q. How many? A. At any one time we had one regular salesman and one specialist. In that period there were a total of three different individuals. Q. Throughout the period you have been employed by King Company have Litter Company representatives been aware that King Company was selling its paints and putty continuously and extensively in New Hampshire? A. Yes.

MR. Sanders: You may inquire, Mr. Brown, if you wish.

Interrogatories by Mr. Brown:

Q. Mr. Gotthardt, on these items, Nuodex items, who billed you for what you did buy? A. We were billed by Nuodex. Q. whom did you pay? A. Nuodex. Q. When you talk about representatives of Nuodex, you knew and know, do you not, that Litter Company employees were also representatives of Nuodex? A. Yes.

MR. SULLOWAY: Object to that as leading.

Interrogatories by Mr. Brown:

Q. In your answers to Mr. Sanders you were distinguishing between Litter people who were representing Nuodex and other representatives of Nuodex than the Litter employees?

MR. SULLOWAY: Objected to as leading.

A. I don't think I exactly understand you, Mr. Brown. I knew that D. H. Litter represented Nuodex. The people I referred to were direct-employees of Nuodex; that is, the other people I referred to as direct employees, not comparable representatives as Litter is.

Interrogatories by Mr. Brown:

Q. Employees rather than agents? A. That's right. Q. And your answer to Mr. Sanders in that sense, or was in that sense?

MR. SULLOWAY: Objected to as leading.

A. That's right.

Interrogatories by Mr. Brown:

Q. You said, in your testimony to Mr. Sanders, that you incorporated Nuodex products initially in your exterior paints, including greenhouse paints? A. Right. Q. Now, your greenhouse paint, White No. 1004, is actually a paint to be used both for exterior and interior of greenhouses? A. That's right. Q. Is that one of the paints you initially introduced this additive to? A. That is the first paint we introduced it to. Q. That was sold by your people for interiors as well as exteriors? A. That's right.

MR. BROWN: No further questions.

Interrogatories by Mr. Sulloway:

Q. Mr. Gotthardt, in connection with any sales your Company made in New Hampshire, did you ever have any representatives from the Nuodex Company present in connection with such sales?

MR. SANDERS: You mean aside from Litter Company employees?

MR. SULLOWAY: That is what I mean. I am not putting that in my question.

A. I don't believe so.

Interrogatories by Mr. Sulloway:

Q. Did you have employees of the Litter Company in New Hampshire with your agents in connection with sales there? A. Not in connection with making a sale, Mr. Sulloway, but in service work. Q. Well, when you say service, you mean by calling on the phone the Company of Litter— A. (Interrupting Counsel) No, I do not mean that. I refer particularly to an instance in Hooksett. I believe it was down in Hooksett. The stand pipe down there had been painted aluminum and was

streaking badly. We asked the D. H. Litter Company's representative, Mr. Cookingham, to come up there and look at that with us. We were interested at that time in developing a new type of paint. He, representing a pigment supplier, came along. Q. Did you understand that pigment supplier in that case was the Nuodex Company? A. No, Aluminum Company of America represented by D. H. Litter. Q. Is that the only time that you know of any employee of Litter Company coming into New Hampshire in connection with the sale of any ingredient you were selling which included Nuodex products? A. That is the only time that I have knowledge of their coming in until the Elliott situation occurred. I think they came up and looked at that. I am not sure of that. Q. You are now referring that after claim was made on account of damage—

MR. BROWN: I object to this as leading.

MR. SULLOWAY: Strike that out.

Interrogatories by Mr. Sulloway:

Q. What you are saying is that until some trouble arose about the product which you had sold, the only occasion you can recall where a Litter Company man came into New Hampshire was the Hooksett occasion, is that right? A. I don't know how often the Litter people came into New Hampshire. In our particular instance, that is so, at least at our behest. Q. In other words, you are not, of course, aware of all the trips they made, whatever they made, in selling. You are simply referring to the one occasion you know about where it was connected with some product you had sold, is that right? A. That is right. This was a specific instance that I happened to participate in personally. Q. Now, when you sold to the Wilbur & Williams people a product that you had bought from the Nuodex Company, the Wilbur & Williams people were in Massachusetts, right?

MR SANDERS: You mean their place of business?

MR. SULLOWAY: Yes.

A. Their home office is in Massachusetts, yes.

Interrogatories by Mr. Sulloway:

Q. And is it correct that they put their own label on that product? A. We labeled it for them. Q. And they sold it as a product of Wilbur & Williams, is that right? A. That is right. Q. Now, when you incorporated any of the Nuodex products in paint, is it a fact that you had somebody else, some other paint manufacturer do that? A. No. We put it in

ourselves, unless there was a subcontractor making paint for us to our formulation and under our supervision. Q. I think you have referred on one occasion to doing business with some paint company who incorporated the Super Ad-It or other product in that paint? A. I think at that time we were referring to the Durand Paint Company. Q. I was. A. Subsequent to that time I checked my records and find that they did not make any paint in which Super Ad-It was an ingredient for us. Q. So that all of the Super Ad-It products which you bought from Nuodex, which went into paint, you actually incorporated that product in the paint in one of your factories, is that right? A. That is correct. Q. And then sold it as E. & F. King paint? A. That's right. * * * *

OPINION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 1465

W. H. Elliott & Sons Co., Inc.

v.

E. & F. King & Co., Incorporated

and

Nuodex Products Co., Inc.

A.J.C.

CONNOR, J. This is a civil action brought by W. H. Elliott & Sons Co., Inc., against two foreign corporations, E. & F. King & Co., Incorporated and Nuodex Products Co., Inc. The complaint alleges two theories of recovery on separate counts, the first for negligence, and the second for breach of warranty. Jurisdiction is based on diversity of citizenship, and service of process was made under Rule 4, (d), (3), and (7) of Federal Rules of Civil Procedure in the mode prescribed by the statutory laws of this state. RSA 300: 11. Venue for this court is established by the fact that the plaintiff is a resident of New Hampshire.

Each defendant filed a motion to dismiss, that of defendant King Company being on the sole ground that it was a foreign corporation, not doing business in the District of New Hampshire, and hence not subject to service of process here. This motion has been waived. The defendant Nuodex Products Co.

moved to dismiss upon two grounds, the first, that the complaint failed to state a claim upon which relief could be granted, and second, that Nuodex is a foreign corporation, not doing business in the State of New Hampshire, and therefore not subject to service of process in this district. Upon hearing, the court denied the first part of the motion. Thereafter, a further hearing was had on the question of jurisdiction. Prior thereto, the defendant King Company answered to the merits, and filed a cross-claim against Nuodex, alleging that Nuodex was doing business within the state of New Hampshire and subject to the jurisdiction of this court.

The hearing was limited to two issues: (1) whether the defendant Nuodex was transacting business in New Hampshire so as to be subject to service of process within this district, and (2) whether the defendant Nuodex has waived its right to contest the question by previously arguing and submitting for decision the issue of whether the plaintiff states a claim upon which relief can be granted.

FINDINGS OF FACT

The plaintiff in this action, W. H. Elliott & Sons Co., Inc., hereinafter referred to as Elliott, is a New Hampshire corporation, having its usual place of business in Madbury, New Hampshire. The defendants, E. & F. King & Co., Incorporated, hereinafter referred to as King, and Nuodex Products Co., Inc., hereinafter referred to as Nuodex, are corporations chartered in Massachusetts and New York, respectively. The plaintiff alleges that it suffered substantial property damage due to a product, Super-Adit, manufactured by defendant Nuodex, and added by defendant King to greenhouse paint which King sold to the plaintiff.

Nuodex is a manufacturer of special-purpose chemicals used by various industries, and has its usual place of business in New Jersey. As its products are essentially used by manufacturers, Nuodex does not ordinarily sell through the usual retail market. Instead its sales in the United States are primarily, although not exclusively, entrusted to seventeen corporate sales representatives whose activities are supervised by six regional Nuodex sales managers. In the region which includes New Hampshire, Nuodex' sales representative is D. H. Litter Company (hereinafter referred to as Litter), a New York corporation, having a branch

office in Allston, Massachusetts. Besides representing Nuodex, Litter has at least seven other accounts, mostly with chemical concerns. It is an independent corporation, and Nuodex has no financial interest in it or any control over it. Litter's payment from Nuodex is in the form of a five per-cent commission, and its soliciting personnel are its own employees who are paid directly by it.

Litter's activity in New Hampshire on Nuodex' behalf has been carried on by a single employee. He regularly contacted and solicited all business firms in this state known to have a present or prospective interest in any of Nuodex' products. In order to help Litter stimulate sales, Nuodex furnished it with advertising material and samples. On behalf of Nuodex, the salesman gave customers such technical advice and assistance as he could. On at least two occasions, the New England divisional manager of Litter came into New Hampshire to confer in reference to business pertaining to Nuodex. Although the salesman would occasionally receive an order from a particular customer, the customers would generally forward the order directly to Nuodex, which, in turn, shipped the product to the customer, and Nuodex alone determined whether the purchase could be made on credit. The products promoted in New Hampshire by Litter consisted, at one time or another, of most of Nuodex' output, including Super-Adit, the product here complained of.

On its part, Nuodex carried on few activities independent of Litter. It advertised in various trade journals which circulated in New Hampshire. It sometimes mailed samples directly to buyers, since it maintained a mailing list of all its customers, including those in this state. In one instance, Nuodex sent a technician from its New York laboratory to assist a local firm in solving some fabric-treating problems. Nuodex' most overt act was to register some of its products under the terms of a New Hampshire statute which provides that "it shall be unlawful for any person to distribute, sell, or offer for sale within this state * * * any economic poison which has not been registered * * *." RSA 438: 2.

The product here complained of, Super-Adit, was sold by Litter to King in Massachusetts. King subsequently added this product to a special paint which it was selling for use in greenhouses. While there is no evidence that Elliott purchased this paint directly from King, the present state of the pleadings dis-

closes this to be so. Similarly, there is no evidence that either Nuodex or Litter sold it to the plaintiff, nor is such asserted in either the complaint or answer.

CONCLUSIONS AND RULINGS

The essential question here presented, whether a foreign corporation is subject to service of process, is one of substance. Canvas Fabricators, Inc. v. William E. Hopper & Sons Co., 7th Cir., 1952, 199 F.2d 485, 488. Since there is no federal statute applicable and this is a diversity case, it follows that the issue must be determined by state law, as in matters of substance this court is "in effect only another court of the State * * *." Guaranty Trust Co. v. York, 326 U. S. 99, 108. Such is the rule of this circuit. Pulson, et al. v. American Rolling Mill Co., 1st Cir., 1948, 170 F.2d 193; Kelley v. Delaware, L. & W. R. Co., 1st Cir., 1948, 170 F.2d 195; see also Canvas Fabricators, Inc. v. Hopper & Sons Co., *supra*, 486; Olshansky v. Thyer Mfg. Corp., D.C. N.D. Ill., 1952, 13 F.R.D. 227, 230; Read v. Corbitt, D.C. E.D. Pa., 1950, 10 F.R.D. 125. And this position is further enforced by the fact that the validity of the service of process is predicated upon a state statute.

Despite the foregoing, it has been urged upon this court that this case is governed, not by local law, but by the rule laid down in International Shoe v. Washington, 326 U. S. 310. In that case, the Supreme Court, brushing aside the old distinctions of "presence" and "doing business," announced that due process now requires only that a foreign corporation maintain such minimum standards within the state which is asserting jurisdiction, so that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." Id. 316. In formulating this new "test", the Supreme Court was setting limitations upon state courts and was not defining the lengths to which a federal court must go in asserting jurisdiction over a foreign corporation. If International Shoe applies to federal courts at all, it applies when the federal court is expounding state law in a diversity case by laying down due process limitations upon the scope of its jurisdiction. A possible reason for the parties to the action urging an opposite view upon this court is found in the language of Grace v. Company, 95 N.H. 74. There, the court quotes an earlier New Hampshire decision to the effect that the "question is one of federal law," and goes on to say that it considers "federal decision

as controlling rather than convincing." Id. 76. This statement was taken to mean that federal law and not state law decides whether or not New Hampshire will exercise jurisdiction over a foreign corporation in a particular case. To accept the language as a statement of the law would be to ignore several other factors. First of all, the basic issue involved in all these cases is the scope of a state statute (in New Hampshire RSA 300: 11), and except for the due process limitations placed on it by certain constitutional pronouncements like the International Shoe case, there hardly can be said to be any federal law on the question. Secondly, if a later case, Kenison, C. J., seems to have overruled any such interpretation of the language in Grace v. Company, *supra*, when he pointed out that while "many of the persuasive authorities cited are federal cases, the issue to be decided is one of state law." LaBonte v. Company, 98 N.H. 163, 166. Thirdly, the test laid down in International Shoe v. Washington, *supra*, must be considered in a case such as this, not because the federal constitutional limits upon the acquisition of jurisdiction by state courts as discussed in that case apply directly to federal courts, but because federal consequences cannot properly be attached to an unconstitutional state law.

Turning now to local law, it appears that the Supreme Court of New Hampshire has passed on the question of the power to serve process upon foreign corporations only three times since the International Shoe case. Grace v. Company, *supra*; Taylor v. Company, 97 N. H. 517; LaBonte v. Company, *supra*. In the first of these cases, the trial court, after reserving and transferring the question of jurisdiction over a foreign corporation, was directed to "be guided in its findings and ruling by International Shoe Co. v. Washington, * * * ." Grace v. Company, *supra*, 77. As a result of this case, New Hampshire adopted the "reasonable and just" test (Id. 76), and all previous decisions must be considered as overruled.

In laying down the test of "fair play and substantial justice" the Supreme Court of the United States suggested several "criteria" or "standards" which could be used to measure the facts in each case. Some of these have been utilized by the local court in applying the above quoted test. Without losing sight of the basic principle that each case must be decided on its own facts, Favell-Utley Realty Co., et al. v. Harbor Plywood Corp., D.C. N.D. Calif., 1950, 94 F. Supp. 96, 98, I feel that I should measure

the facts of this case against these standards in reaching my decision.

The first criteria suggested both by the Supreme Court of the United States and of New Hampshire, is whether the defendant's activities were "systematic and continuous." International Shoe v. Washington, *supra*, 320; Taylor v. Company, *supra*, 519. The activities carried on in this state by Litter on behalf of Nuodex were continuous and systematic. Litter's salesman, regularly and systematically, visited various business concerns in New Hampshire, and would attempt to "sell everything for all the companies we represent." It is true that some federal cases have held that "mere solicitation" is not enough. Roberts v. Evans Case Co., 7th Cir., 1955, 218 F.2d 893; Johns v. Bay State Abrasive Products Co., D. C. Md., 1950, 89 F. Supp. 654. But these were based upon local law and not upon constitutional principles. On the other hand, Justice Rutledge has observed that no "business man would regard 'selling,' 'the taking of orders,' 'solicitation,' a. not 'doing business'." Frene, et al. v. Louisville Cement Co., C.A. D.C., 1943, 134 F.2d 511, 516. Commenting upon this, Carter, J., said: "We are in agreement with the conclusion reached by Justice Rutledge and the trend of the courts in the more recent cases that mere solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business." Perkins v. Louisville & N. R. Co., D.C. S.D. Calif., 1951, 94 F. Supp. 946, 951; see also, London's Inc. v. Mack Shirt Corporation, D.C. Mass., 1953, 114 F. Supp. 883. This trend has met with local approval. In Taylor v. Company, *supra*, the activity carried on in this state was very similar to that in the case at bar. There, the plaintiff, acting as agent for the defendant, sought out new dealers, helped to servic established accounts, and attempted to stimulate new business for the defendant's products. In holding that the defendant was subject to the jurisdiction of New Hampshire courts, the court recognized that solicitation is an essential commercial activity. "Distribution can be made however only where a market exists, and a market in turn depends upon demand." Id. 520. "In our judgment thi. activity was of such a character as to make it reasonable and just to subject the defendant to the jurisdiction of the courts of this state." Id. 520.

Once accepting the proposition that solicitation is a commercial activity, recognized by New Hampshire as sufficient to con-

stitute "transacting business" under New Hampshire RSA 300: 11(c), we are faced with the problem whether or not the activities of Litter can be attributed to Nuodex. I believe the fact that Litter was a separate and independent corporation and not an "agent" of Nuodex, in the legal sense, is not a bar to service of process upon Nuodex in New Hampshire. In LaBonte v. Company, *supra*, the Supreme Court held the defendant, The American Mercury, subject to service of process, even though all of the activities attributed to the defendant in this state were carried on by the Rumford press, an independent and separate corporation, which was even less under the direction of American Mercury than Litter was under the direction of Nuodex. Nor is it of any significance that Litter worked for several other companies besides Nuodex. Rumford Press printed many magazines other than the American Mercury. Learned Hand, J., expressed what seems to me to be the best rule when he said: " * * * we cannot see that it was important that the agent worked for several principals." Bomze, et al. v. Nardis Sportswear, Inc., 2d Cir., 1948, 165 F.2d 33, 36.

Whether or not it is a violation of due process to hold Nuodex subject to service on account of the activities of an independent corporation, and whether it is of consequence that Litter is not a New Hampshire corporation, are questions to be deferred until the other criteria or standards are resolved. Under the rule of this circuit, the question of due process "is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation." Pulson v. American Rolling Mill Co., *supra*, 194.

A second criterion or "standard" suggested by the Supreme Court of the United States and the Supreme Court of New Hampshire is to estimate the inconvenience "which would result to the corporation from a trial away from its 'home' or principal place of business." International Shoe v. Washington, *supra*, 317; cited and adopted in Taylor v. Company, *supra*, 519. In the case at bar, there seems to be no basis for holding that it would be a hardship to require Nuodex to defend this suit in New Hampshire. In weighing the equities of this case, it appears that it is not inconvenient to hold trial here. Nuodex admits that it can be served with process in Massachusetts, and the few extra miles of travel to the district of the situs imposes no undue burden.

A third criterion suggested in International Shoe (at page 319)

is to examine the extent to which the defendant exercised the privilege of conducting activities within New Hampshire, and has enjoyed the benefits and protection of its laws. It appears that the local courts have not adopted this criterion, for nowhere is it discussed. But it could be observed that the defendant did take advantage of the provisions of New Hampshire RSA 438: 3, and registered its products so that they might be legally sold in this state, and, as the United States Supreme Court observes, the "exercise of that privilege may give rise to obligations * * *." International Shoe v. Washington, *supra,* 319.

The fourth criterion or standard suggested in the International Shoe case (at p. 319) is to examine how far the obligations sued upon arise out of, or are connected with, the activities of the foreign corporation within the state. This test has been adopted by the Supreme Court of New Hampshire. Taylor v. Company, *supra,* 519, 521; LaBonte v. Company, *supra,* 168. It probably is most clearly expressed in the Taylor case, where it was said: "It is not essential that the cause of action arise in New Hampshire, provided it arises out of business done here." (See p. 519). I am unable to discover any activity in the state which is connected with the injury here complained of. There is no evidence that King purchased Super-Adit because of solicitation or advertising in New Hampshire, nor is there any evidence that the plaintiff purchased King's paint because of Nuodex' activities within the state. Therefore, I conclude that this fourth "standard" is not met.

This raises the question as to whether all of the standards or criteria must be present in order to confer jurisdiction. In International Shoe, Chief Justice Stone continually refers to these as criteria or "standards." (See pp. 319, 320). But the Supreme Court of New Hampshire, purporting to adopt the language in that case, refers to the criterion that the cause of action arise out of or be connected with activities within the state as a "requirement." Taylor v. Company, *supra,* 521; LaBonte v. Company, *supra,* 168. Therefore, it would seem that in New Hampshire there is no jurisdiction unless this "requirement" is met. It does not matter that the court might not have intended to be as strict as this language sounds. The Court of Appeals for this circuit has ruled that "Whether this be so or not we think it is no business for a federal court to meddle in. * * * We think it is the business of the federal court to follow the state court's construc-

tion of its own statute * * * until the state court announces a different rule." Pulson v. American Rolling Mill Co., *supra*, 195. In the light of the state court's use of the word "requirement," I feel that I have no choice but to rule that this court lacks jurisdiction.

Nor is there any merit in the argument that the state must grant jurisdiction if the federal limits of due process allow. "Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process." Missouri P. R. Co. v. Clarendon Co., 257 U. S. 533, 535; Perkins v. Benguet Consolidated Mining Co., et al., 342 U. S. 437, 440.

It is jointly urged by the plaintiff and the co-defendant that Nuodex, by submitting the first branch of its motion to dismiss* on the ground that the complainant fails to state a claim upon which relief can be granted, waived the question of jurisdiction raised in the second branch of its motion.

This contention invites but brief consideration. Whatever support this claim of waiver might have had under common law practice, the theory has no standing under Rule 12(b) of the Federal Rules of Civil Procedure, which provides in part as follows: "Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the respective pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (2) lack of jurisdiction over the person, * * * (6) failure to state a claim upon which relief can be granted, * * * . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by

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*The motion: "Now comes the defendant Nuodex Products Co., Inc. and moves the Court as follows: (1) To dismiss the action because the complaint fails to state a claim against the defendant Nuodex Products Co., Inc. upon which relief can be granted.

(2) To dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant Nuodex Products Co., Inc. is a corporation organized under the laws of the State of New York, which has never done business within The State of New Hampshire, and was not and is not subject to service of process within the District of New Hampshire."

being joined with one or more other defenses or objections in a responsive pleading or motion. * * * ."

The authorities seem to be in complete accord that the joining of defenses in a motion creates no waiver. A like situation was before the court in Olshansky v. Thyer Mfg. Corp., *supra*, and the claim of waiver was rejected. See also, Orange Theatre Corp. v. Rayheratz Amusement Corp., 3d Cir., 1944, 139 F.2d 871, 874; Blank v. Bitker, 7th Cir., 1943, 135 F.2d 962, 966; 2 Moore's Federal Practice, 2262 - 2264.

Nuodex not being subject to service within this district, the return must be quashed and the action dismissed. An order will be so entered.

April 18, 1956.

ORDER

April 18, 1956

(Caption Omitted)

In conformity with the opinion filed this date, it is ordered that as to Nuodex Products Co., Inc. the return be and it hereby is quashed and the action be and it hereby is dismissed.

Aloysius J. Connor
United States District Judge.

PLAINTIFF-APPELLANT'S STATEMENT OF QUESTIONS INVOLVED ON APPEAL

(Caption Omitted)

1. Whether the District Court erred in dismissing a diversity complaint as to the foreign corporation Nuodex Products Co., Inc., after finding on the evidence that this defendant was doing business in New Hampshire continuously and systematically, sufficiently to constitute "transacting business" under New Hampshire R.S.A. 300:11(c), and would not be inconvenienced to defend the action in New Hampshire, when the cause of action arose wholly within the District of New Hampshire.

2. Whether the District Court erred in its interpretation and application of the law of New Hampshire relating to establishing jurisdiction over foreign corporations transacting business in the District of New Hampshire, for diversity jurisdiction in the District Court, where the cause of action arose in the District.

3. Whether the District Court erred in ruling that a diversity cause of action arising in the District must arise out of or be